79-590

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-

THE TELEX CORPORATION, a corporation, and TELEX COMPUTER PRODUCTS, INC., a corporation,
Petitioners,

v.

BROBECK, PHLEGER & HARRISON, a partnership,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

CONSTITUTIONAL PROVISIONS:

STATUTORY PROVISIONS AND RULES:

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Petitioners, The Telex Corporation and Telex Computer Products, Inc., pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action on July 5, 1979.

OPINION BELOW

The District Court did not issue an opinion. The District Court entered an Order granting the Respondent's motion for summary judgment. The *per curiam* opinion of the Court of Appeals will be officially reported at 602 F.2d 866 (9th Cir. 1979). A copy of the

slip opinion is reproduced in the Appendix at pp. 1a-19a.

JURISDICTION

The District Court's Order granting the Respondent's motion for summary judgment was entered on January 26, 1977. Judgment was entered on January 31, 1977. The Opinion of the Court of Appeals was filed on July 5, 1979. Petitioner's Petition for Rehearing and Suggestion of Appropriateness of a Rehearing In Banc was filed July 19, 1979 and was denied on September 6, 1979. See Appendix, at p. 20a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal court, sitting under its diversity jurisdiction, can constitutionally apply the forum state's parol evidence rule to deprive a party of its seventh amendment right to a jury trial on disputed fact issues?

2. Whether a federal court, upon a hearing on a motion for summary judgment under Federal Rule of Civil Procedure 56, can weigh conflicting evidence and resolve disputed issues of fact?

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Seventh Amendment

The seventh amendment to the Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Fed. R. Civ. P. 56, 28 U.S.C. App.

> "(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

STATEMENT

A. Statement of the Case

1. The action was filed by Respondent, Brobeck, Phleger & Harrison ("Respondent") against Petitioners, The Telex Corporation and Telex Computer Products, Inc. ("Petitioners") in the United States District Court for the Northern District of California on October 21, 1975.

2. The District Court had jurisdiction of the case by virtue of diversity of citizenship, pursuant to 28 U.S.C. § 1332.

3. In the action Respondent seeks to recover $1,000,000 and accrued interest under an alleged written employment contract.

4. Petitioner, The Telex Corporation, is a Delaware corporation with its principal place of business in Tulsa, Oklahoma. Petitioner, Telex Computer Products, Inc., is an Oklahoma corporation with its principal place of business in Tulsa, Oklahoma.

5. Respondent is a San Francisco-based law partnership, resident in California.

6. Both Respondent and Petitioners filed motions for summary judgment in the District Court. [R. 154, 236].[1] On January 26, 1977, the District Court entered an order granting Respondent's motion for summary judgment and denying Petitioners' motion for summary judgment. [R. 447]. On January 31, 1977, a formal entry of final judgment was filed awarding Respondent the sum of $1,000,000, plus interest thereon at the rate of 7 percent per annum from October 8, 1975. [R. 469]. The District Court did not write a formal opinion.

7. On July 5, 1979, the United States Court of Appeals for the Ninth Circuit entered its opinion and judgment, affirming the District Court's Order.

8. The United States Court of Appeals for the Ninth Circuit had jurisdiction of the appeal pursuant to 28 U.S.C. § 1291.

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[1] Cross motions for summary judgment, of course, are no more than a claim by each side that it alone is entitled to summary judgment, and the making of such inherently contradictory claims does not constitute an agreement that if one is rejected the other is necessarily justified or that the losing party waives judicial consideration and determination whether genuine issues of fact exist. 6 *Moore's Federal Practice*, ¶ 56.13, pp. 56-341 to 56-345; 10 Wright & Miller, *Federal Practice and Procedure*, § 2720 at pp. 459-467.

B. Statement of the Facts

Petitioners sued International Business Machines Corporation ("IBM") alleging violations by IBM of the federal antitrust laws. The history of the Telex-IBM antitrust action is set forth in *Telex Corp.* v. *International Business Mach. Corp.*, 510 F.2d 879 (10th Cir. 1975). Petitioners won a judgment against IBM in the District Court for $259.5 million. IBM recovered two judgments on counterclaims against Telex, a $21.9 million trade secret judgment and a $13,000 copyright infringement judgment. The United States Court of Appeals for the Tenth Circuit reversed the Telex antitrust judgment and entered judgment for IBM. IBM's trade secret judgment was affirmed (but reduced to $18.5 million). Petitioners did not appeal IBM's copyright infringement judgment.

Following Petitioners' loss in the Court of Appeals, Petitioners asked Moses Lasky, a partner in the Respondent, to represent Petitioners in preparing a petition for a writ of certiorari. [Wheeler Dep. 6, 7; Jatras Dep. 24]. Mr. Lasky drafted a contingent fee agreement. [R. 526, *et seq.*]. The contingent fee agreement was signed by Petitioners and Respondent. [R. 531]. Then, Petitioners and Respondent exchanged two letters about the intent of the contingent fee agreement. [R. 533, 537].

The intent of the parties in entering into the contingent fee agreement is the source of the dispute between Respondent and Petitioners.

Mr. Lasky proposed a 5 percent contingent fee for representing Petitioners in the Supreme Court. Petitioners proposed that anything due IBM on IBM's counterclaim judgment be deducted before calculating

the 5 percent contingent fee. Mr. Lasky, in turn, suggested that the amount of the counterclaim be deducted only if judgment or settlement brought Petitioner $40 million or less. Mr. Lasky also suggested a $1 million minimum fee; Petitioners said the minimum contingent fee "seemed reasonable, provided it was out of the proceeds of a cash recovery by Telex." In the negotiations, Petitioners pointed out to Mr. Lasky several times that Petitioners could not, and would not, agree to pay a substantial contingent fee "unless we got something to pay it from." [Jatras Dep., pp. 31-35]. Later, Mr. Lasky denied ever hearing such statements. [Lasky Dep., p. 34].

Following the negotiations between Petitioners and Respondent, Respondent drafted, executed and delivered (by letter dated February 24, 1975) a proposed contingent fee agreement to Petitioners. [R. 526, 531]. The contingent fee agreement provided that, if Petitioners recovered less than $40 million gross from IBM, Respondent's contingent fee would be 5 percent "based upon the net recovery, *i.e.*, the recovery after deducting the credit to IBM by virtue of IBM's recovery on counterclaims or cross-claims ...." [R. 531]. The Lasky February 24, 1975 letter and the contingent fee argument are set forth in the Appendix at pp. 21a-23a and 24a-25a, respectively.

Petitioners signed the contingent fee agreement, and returned it to Respondent, together with payment of a $25,000 retainer called for by the agreement. [R. 347, 534]. Attached to the letter by which Petitioners returned the contingent fee agreement to Respondent was a set of hypothetical judgments and settlements to confirm Petitioners' understanding how the contingent fee would work. [R. 535]. The letter and the attachment are set forth in the Appendix at pp. 26a-28a and 29a, respectively.

The set of hypothetical judgments and settlements made plain Petitioners' understanding that, if Petitioners received no money from IBM, the $25,000 retainer would constitute payment in full to Respondent for the preparation of the petition for writ. [R. 535]. Mr. Lasky cashed the $25,000 retainer check and confirmed that Petitioners' understanding of the contingent fee agreement was correct in a letter to Petitioners dated March 3, 1975. The Lasky letter dated March 3, 1975 is set forth in the Appendix at pp. 30a-31a. The Lasky letter states, in pertinent part:

> "You and we appear to be in accord on the three matters to which your letter of February 28 refers.
>
> * * *
>
> "Your attachment of examples of our compensation in various contingencies is correct, it being understood that the first example is applicable only to a situation where the petition for certiorari has been denied, as stated in paragraph 1 of the 'Memorandum.'" [R. 538].

Mr. Lasky prepared the petition for writ and filed it, only four months later, in July of 1975. [R. 4].

In October of 1975, Petitioners threw in the towel in its battle with IBM. Petitioners withdrew their petition for a writ of certiorari and IBM released its $18.5 million trade secret judgment. Petitioners paid the IBM copyright judgment (some $20,000) and suffered adverse injunctive relief. Petitioners received nothing. [Plaintiff's Exhs. 20, 21, 22, 25, 26, 29].

Despite the fact that Petitioners recovered nothing from IBM, Respondent demanded $1,000,000 from Petitioners—apparently as a contingent attorney's fee. [R. 1, *et seq.*]. Then, Respondent commenced this action.

Without a trial, and despite the fact that the District Court considered and weighed the conflicting evidence before it, the District Court entered summary judgment against Petitioners and in favor of Respondent for $1,000,000.

REASONS FOR GRANTING THE WRIT

1. *The Seventh Amendment.* This Court should grant certiorari because the decision of the District Court (affirmed by the Court of Appeals) raises a fundamental constitutional issue pertaining to the relationship of the seventh amendment and the rule of *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938). The issue squarely presented in this case is whether a federal court, sitting under diversity jurisdiction, can constitutionally apply the parol evidence rule of the state in which it is sitting to deprive a party of its federally granted, seventh amendment right to a jury trial. This case is one of first impression and presents an important question that this Court should address. The present fact situation illustrates the tension created when conflicting policies of the seventh amendment and the rule of *Erie R.R. Co.* v. *Tompkins, supra,* collide. This tension can best be appreciated by sketching, in summary form, the historical background surrounding the seventh amendment and the *Erie* rule.

(a) *History of the Seventh Amendment:* The seventh amendment to the Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by a jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The seventh amendment has been consistently held to apply only to federal courts.[2] *Pearson* v. *Yewdall,* 95 U.S. 294 (1877); *Edwards* v. *Elliott,* 88 U.S. (21 Wall) 532 (1874); *St. Louis and K.C. Land Co.* v. *Kansas City,* 241 U.S. 419 (1916). It does not apply to state court proceedings. *Minneapolis & St. Louis R.R. Co.* v. *Bombolis,* 241 U.S. 211 (1916); *Wartman* v. *Branch 7, Civil Division . . .,* 510 F.2d 130 (7th Cir.

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[2] Significantly, the Constitution of the United States originally failed to provide for a right to a civil jury trial. Alexander Hamilton in the *Federalist* emphasized his loyalty to the jury system in civil cases, but felt it unnecessary to include in the Constitution a specific provision placing jury trial in civil cases in the same high position as jury trial in criminal cases. (*Federalist,* Essays Nos. 81-83). However, in the ratification disputes in the several states, one of the strongest objections taken was the want of an express provision securing the right of trial by jury in civil cases. *See, Parsons* v. *Bedford, Breedlove & Robeson,* 28 U.S. (3 Pet.) 433, 466 (1830). Of the several states which, in ratifying the Constitution, proposed amendments, six included proposals for preserving jury trials in civil cases. The first Congress, therefore, provided for common law cases by a jury, even when such trials were in the Supreme Court itself. 1 Stat. 73, 81. See *State of Georgia* v. *Brailsford,* 3 U.S. (3 Dall.) 1 (1794), in which the Supreme Court, in a case involving its original jurisdiction, empaneled a jury. When the Bill of Rights was proposed to the states and ratified, the seventh amendment was included therein.

1975).[3] The coverage of the amendment is limited to rights and remedies peculiarly legal in their nature, and such as was proper to assert in courts of common law. *Shields* v. *Thomas,* 59 U.S. (18 How.) 253 (1856). The use of the term "common law" in the amendment as indicating those cases in which the right to a jury trial was to be preserved reflected the division of the English and American legal systems into separate law and equity jurisdictions, in which actions cognizable in courts of law were triable to a jury. However, in *Ross* v. *Bernhard,* 396 U.S. 531 (1970), this Court further held that the right to a jury trial depended on the nature of the issue to be tried rather than on the procedural framework in which it was raised.

(b) *The Erie Rule.* In 1938, this Court rendered the landmark decision of *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938). The bench and the bar are still struggling with the implications of *Erie* and its application to a multitude of procedural and substantive issues. *Erie* held that in diversity cases, the substantive law to be applied in the case was the law of the state in which the federal court was sitting. *Erie* has caused this Court a considerable number of problems, especially in the area of procedure. Originally, the Court was of the opinion that the state law would govern whenever the outcome of the diversity litigation could be substantially affected by application of the relevant

[3] Because the seventh amendment does not apply to the states, certain practices common in the state court systems may not be applied in the federal courts. Examples of such practices include the unrestricted review of the facts as determined by a jury, *Scheznayder* v. *Bunge Corporation,* 508 F.2d 1069 (5th Cir. 1975); *Fontenot* v. *Marquette Casualty Co.,* 161 So. 2d 467 (La. App. 1963), and additur, *Dimick* v. *Schiedt,* 293 U.S. 474 (1935); *Hawkes* v. *Ayers,* 537 F.2d 836 (5th Cir. 1976).

federal rule. See, *Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1945).[4] It was thus perhaps inevitable that a case would reach this Court involving the tensions between the seventh amendment and the *Erie* rule. That case was *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc.,* 356 U.S. 525 (1958).

(c) *Byrd* v. *Blue Ridge Electric Cooperative, Inc.* In *Byrd,* a diversity action was brought against an electric company for injuries sustained by a lineman, who was employed by a construction contractor, while constructing power lines to a new substation. The electric company raised the affirmative defense that the lineman was a statutory employee and his exclusive remedy was under the state workmen's compensation law. Because of the state workmen's compensation law, the lineman had no occasion to introduce evidence to meet the affirmative defense, which was stricken by the trial court. The district court entered judgment for the lineman and the electric company appealed. The Court of Appeals reversed the trial court and directed entry of judgment for the company, and this Court granted certiorari. This Court held that the statute did grant the electric company immunity if it established that its crews performed like work as the contractor, but erred

[4] Therefore, the state rule making unsuccessful plaintiffs liable for all expenses and requiring security for such expenses as a condition of proceeding was held to be applicable in federal court in *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1941); a state statute barring a foreign corporation not qualified to do business in a state was held applicable in federal court in *Woods* v. *Interstate Realty Co.,* 337 U.S. 535 (1949); and a state rule determining when an action is begun for purposes of the statute of limitations was held applicable in federal court despite a contrary federal rule of civil procedure in *Ragan* v. *Merchants Transfer and Warehouse Co.,* 337 U.S. 530 (1949).

in making its own determination on the record that a lineman was a statutory employee instead of remanding to give the lineman an opportunity to introduce further evidence on the issue to a jury. This Court, in evaluating the considerations involving *Erie* and the seventh amendment, and while recognizing that under a strict application of *Erie,* the state rule which reserved the determination of the statutory immunity defense to the judge would govern, noted that there were countervailing considerations present which made such a judge's determination inappropriate in the federal context. The Court held that an essential characteristic of the federal system is the manner in which, in civil law actions, it distributes trial functions between a judge and jury and under the influence, if not the command of the seventh amendment, assigns the decision of disputed questions of fact to the jury. The Court therefore held that the basic inquiry was,

> "Whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the directive that the litigation should not come out one way in the federal court and another way in the state court." *Id.,* 356 U.S. at 538.

The Court held in favor of the federal considerations in allocating the function of determining the disputed issue to a jury. *Byrd* v. *Blue Ridge Rural Electric Cooperative, Inc., supra,* points the way in this case and resolves the tension in favor of Petitioners' right to have the evidence introduced in a new trial and be determined by the jury.[5]

[5] *Byrd* was quickly followed by *Magenau* v. *Aetna Freight Lines, Inc.,* 360 U.S. 273 (1959), where this Court held that the question whether an employer-employee relationship existed for purposes of a workmen's compensation act was a question for the jury, despite a contrary state rule. Federal courts have subsequently followed *Byrd* in holding that the practice of remittitur, *Karlson* v. *305 E. 43rd St. Corp.,* 370 F.2d 467 (2d Cir. 1967), *cert. denied,* 387 U.S. 905, the scope of a federal court judgment, *Williams* v. *Ocean Transport Lines, Inc.,* 425 F.2d 1183 (3d Cir. 1970); *Kern* v. *Hettinger,* 303 F.2d 333 (2d Cir. 1962), the standard for sufficiency of the evidence, *Molinar* v. *Western Electric Co.,* 525 F.2d 521 (1st Cir. 1975), *cert. denied,* 424 U.S. 978; *Boeing Co.* v. *Shipman,* 411 F.2d 365 (5th Cir. 1967), the proper jury size, *Wilson* v. *Nooter, Inc.,* 475 F.2d 497 (1st Cir. 1973), *cert. denied,* 414 U.S. 865, the application of a state medical liability mediation panel, *Wheeler* v. *Shoemaker,* 78 F.R.D. 218 (D.R.I. 1978), and the appropriateness of the unit of time argument concerning pain and suffering, *Baron Tube Co.* v. *Transport Insurance Co.,* 365 F.2d 858 (5th Cir. 1966), were all governed by federal law in diversity cases.

(d) *The Present Case.* Both the District Court and the Court of Appeals applied the California parol evidence rule. While the normal rule of parol evidence is considered to be a substantive issue to be determined by state law in a diversity case, see *Lyon* v. *Mutual Benefit Health & Accident Assoc.,* 305 U.S. 484 (1939), the parol evidence rule in the normal situation does not permit the court to weigh extrinsic evidence. However, in the present case, the Court applied the unusual California parol evidence rule. The California rule requires the court to receive extrinsic evidence establishing a meaning to which the language of a writing is reasonably susceptible. If the court finds, after considering this preliminary evidence, that the language of the contract is susceptible of more than one interpretation, this extrinsic evidence is then permitted to be introduced in front of the jury and when introduced, the question of meaning becomes one of fact. See Appendix, at p. 10a.

The Court of Appeals' opinion clearly discloses that it *weighed* the extrinsic evidence presented by Peti-

tioners under the California parol evidence rule. The Court of Appeals discussed the credibility of the three persons involved in the formation of the contingent fee agreement: Lasky, Jatras (President of Petitioner Telex Corporation) and Walker (Petitioners' then attorney). The courts below analyzed the credibility of Jatras' testimony that an additional fee would be paid only if there was a net recovery, and weighed his credibility. In weighing Jatras' credibility, the District Court and the Court of Appeals removed from the jury the principal function entrusted to the jury in a common law action preserved by the seventh amendment.[6]

> "The district court apparently concluded that this evidence was insufficient to reasonably support Telex's interpretation of the contract. Having carefully reviewed this evidence, taking the facts presented by Telex as true and resolving all doubts in its favor, see *Handi Investment Corp.* v. *Mobil Oil Corp.*, 550 F.2d 543, 546 (9th Cir. 1977), we agree with the district court. We find that this evidence, if anything, compels our interpretation of the contract.
>
> "The extrinsic evidence advanced by Telex to support its interpretation of the contract consists almost exclusively of Jatras' belief that an additional fee would be paid only if there was a net recovery (*i.e.*, a settlement in excess of the counterclaim judgment). *Jatras claims that he expressed his belief to Lasky on several occasions.*
>
> "To the extent that Telex is relying on Jatras' subjective belief to establish the meaning of the

[6] It is clear that the issue of the legal fees to be paid an attorney under a contingent fee contract is a legal action, one at law and not one at equity. *Simler* v. *Conner*, 373 U.S. 221 (1963); *Kerr McGee Corp.* v. *Bokum Corp.*, 453 F.2d 1067 (10th Cir. 1972).

> contract, we must disagree. Under the modern theory of contracts we look to objective, not subjective, criteria in ascertaining the intent of the parties. See *Meyer* v. *Benko*, 55 Cal. App. 3d 937, 127 Cal. Rptr. 846 (1976). *Even when we view Jatras's protestations as part of the objective circumstances surrounding the formation of the contract,* we find that they do not make the contract reasonably susceptible to Telex's interpretation, *because Jatras's words are contradicted by his later actions.*"
>
> "In reviewing the objective criteria, we rely heavily on the documents reflecting the negotiations between Telex and Brobeck. *These documents more accurately reflect the parties' intent than the hindsight recollections of the parties.* This is particularly true in this case because Jatras had no independent recollection of the negotiations." Id., Appendix at pp. 13a-15a (emphasis added).

The weighing of the evidence (including evaluation of the credibility of a witness or affiant) is clearly a jury matter in the federal courts. *See e.g., First National Bank* v. *Cities Service Co.*, 391 U.S. 253 (1968); *Mayle* v. *City of New Castle*, 71 F.R.D. 674 (W.D. Pa. 1976). Jatras' claim that he expressed his belief to Lasky must be accepted by the court on a motion for summary judgment. Jatras' statement thus constitutes evidence of objective, not subjective intent. The court is not permitted to evaluate the credibility of an affiant or deponent, nor is the court permitted to disparage the value of testimony by use of impeachment evidence. Finally, a court may not select one form of evidence as preferable, in value, over another form of evidence, as the courts below plainly did. *All of these functions can only constitutionally be performed by the jury.* Permitting the courts to weigh extrinsic evidence, before

it would go to the jury, violates Petitioners' right under the seventh amendment to a full jury trial.

(e) *Conclusion:* The District Court's weighing of the evidence deprived Petitioners of a right guaranteed by the Constitution in a federal court: a jury trial.

2. *Rule 56.* This Court should grant certiorari because the decision of the District Court and of the Court of Appeals raises a fundamental issue pertaining to the procedure used under Rule 56. Briefly put, is it proper for a district court, in applying state law which leaves a fact issue determination to the court, to determine that fact issue on summary judgment rather than reserve it for a non-jury trial? *This question is "an important question of federal law which has not been, but should be settled by this court."* Rule 19(b), Revised Rules of the United States Supreme Court.

Assuming *arguendo* that the seventh amendment is not violated by a district court's application of the weighing-of-evidence aspect of the California parol evidence rule, there still remains a clear federal procedural issue of considerable significance: can a summary judgment be used to take the place of a non-jury trial under Rule 56? This Court has not answered that question, although it appears clear that the summary judgment procedure is not to be used as a substitute for either a jury or non-jury trial. *See, First National Bank* v. *Cities Service Co.,* 391 U.S. 253 (1968); *Porter* v. *Barrett,* 89 F. Supp. 35 (E.D. Pa. 1946); *U.S.* v. *Broderick,* 59 F. Supp. 189 (D. Kan. 1945).

The District Court, in weighing the evidence as to whether the contingent fee agreement was reasonably

susceptible to more than one meaning, must use the standard found in Rule 56: "no genuine issue as to any material fact." The courts below did not use this standard in measuring the credibility of Mr. Jatras and the relative evidentiary importance of the writings. The courts below used the state standard whether, after weighing the extrinsic evidence introduced, the contract was "reasonably susceptible" of more than one meaning. Rule 56 mandates that that determination be made *only after trial* if there is a "genuine issue of material fact." In determining whether there is a genuine issue of material fact, a court may not weigh the evidence.

It is clear that the Rule 56 standard demands much more of a summary judgment movant than the standard applied by the District Court and the Court of Appeals. Under the sumary judgment standard, all inferences to be drawn from the summary judgment materials must be viewed most favorably to the party opposing the motion; in addition, the Court must not weigh the evidence—that is the function of trial. The California rule, by its very wording, permits and even requires a trial court to weigh the evidence.

Finally, the pragmatic differences between a summary judgment proceeding and a non-jury trial must be considered. A summary judgment proceeding is heard on the basis of non-testimonial evidence, such as affidavits, depositions, answers to interrogatories, admissions and documents. No cross-examination is possible; nor can the trier of fact observe the demeanor of the affiant or the deponent.

In the context of this case, where the lower court applied the wrong standard of evidentiary strength, and substituted a summary judgment proceeding for

a non-jury trial, the error is apparent. A clear conflict of testimony existed requiring the weighing of evidence. See *supra,* pp. 6-7. The conflict could not be resolved on a motion for summary judgment. Summary judgment is simply not an adequate substitute for a non-jury trial.

CONCLUSION

The courts below have violated Petitioners' seventh amendment right to a jury trial by applying the California parol evidence rule's weighing-of-the-evidence test. Even if the Court of Appeals were correct in employing the California parol evidence rule, the court nevertheless erred in affirming the District Court's granting of Respondent's motion for summary judgment. The District Court used the hearing on the Respondent's motion for summary judgment as a substitute for a non-jury trial. A summary judgment hearing under Rule 56 is not an adequate substitute for a non-jury trial. Telex was at least entitled to a non-jury trial.

For the foregoing reasons, the petition for a writ of certiorari should be granted and the case set for briefing and argument this term.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, in accordance with Rule 33(1), of the Revised Rules of the Supreme Court of the United States, three true and correct copies of the foregoing Petition for a Writ of Certiorari have been delivered to Brobeck, Pheleger & Harrison, One Market Plaza, Spear Street Tower, San Francisco, California 94105, and Moses Lasky, Esq., One Market Plaza, Stuart Street Tower, San Francisco, California 94105, by placing the same in the United States mail with airmail postage prepaid, certified mail, return receipt requested, correctly addressed, on this 10th day of October, 1979.

APPENDIX

APPENDIX A

Opinion of the United States Court of Appeals for the Ninth Circuit

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-1419

BROBECK, PHLEGER & HARRISON, a partnership,
Plaintiff-Appellee,

vs.

THE TELEX CORPORATION, a corporation, and
TELEX COMPUTER PRODUCTS, INC., a corporation
Defendants-Appellants

Appeal from the United States District Court,
Northern District of California

Before: MOORE*, SNEED and TANG, Circuit Judges

OPINION

Filed July 5, 1979

PER CURIAM:

This is a diversity action in which the plaintiff, the San Francisco law firm of Brobeck, Phleger & Harrison ("Brobeck"), sued the Telex Corporation and Telex Computer Products, Inc. ("Telex") to recover $1,000,000 in attorney's fees. Telex had engaged Brobeck on a contingency fee basis to prepare a petition for certiorari after the Tenth Circuit reversed a $259.5 million judgment in Telex's favor against International Business Machines Corporation ("IBM") and affirmed an $18.5 million coun-

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* Honorable Leonard P. Moore, Senior Circuit Judge for the Second Circuit, sitting by designation.

terclaim judgment for IBM against Telex. Brobeck prepared and filed the petition, and after Telex entered a "wash settlement" with IBM in which both parties released their claims against the other, Brobeck sent Telex a bill for $1,000,000, that it claimed Telex owed it under their written contingency fee agreement. When Telex refused to pay, Brobeck brought this action. Both parties filed motions for summary judgment. The district court granted Brobeck's motion, awarding Brobeck $1,000,000 plus interest. Telex now appeals.

Telex was the plaintiff in antitrust litigation against IBM in the United States District Court for the Northern District of Oklahoma. On Nov. 9, 1973 the District Court found that IBM had violated § 2 of the Sherman Act, 15 U.S.C. § 2 (Supp. IV 1974), and entered judgment for Telex in the amount of $259.5 million, plus costs and attorney's fees of $1.2 million. The court also entered judgment in the sum of $21.9 million for IBM on its counterclaims against Telex for misappropriation of trade secrets and copyright infringement.

On appeal, the Tenth Circuit reversed the entire judgment that Telex had won in the district court. *Telex Corp. v. International Business Machines Corp.*, 510 F.2d 894 (10th Cir. 1975). It also reduced the judgment against Telex on IBM's counterclaim to $18.5 million and affirmed the district court's judgment as modified.

Having had reversed one of the largest antitrust judgments in history, Telex officials decided to press the Tenth Circuit's decision to the United States Supreme Court. To maximize Telex's chances for having its petition for certiorari granted, they decided to search for the best available lawyer. They complied a list of the preeminent antitrust and Supreme Court lawyers in the country, and Roger Wheeler, Telex's Chairman of the Board settled on Moses Lasky of the Brobeck firm as the best possibility.

Wheeler and his assistant made preliminary phone calls to Lasky on February 3, 4, and 13, 1975 to determine

whether Lasky was willing to prepare the petition for certiorari. Lasky stated he would be interested if he was able to rearrange his workload. When asked about a fee, Lasky stated that, although he would want a retainer, it was the policy of the Brobeck firm to determine fees after the services were performed. Wheeler, however, wanted an agreement fixing fees in advance and arranged for Lasky to meet in San Francisco on February 10th to discuss the matter further with Telex's president, Stephen Jatras, and Floyd Walker, its attorney in the IBM litigation.

The San Francisco meeting was the only in-person meeting between Lasky and the Telex officials on the subject of Brobeck's compensation. Jatras told Lasky that Wheeler preferred a contingency fee arrangement. Lasky replied that he had little experience with such arrangements but proposed a contingency fee of 5% of either the judgment or settlement. Jatras thought there should be a ceiling and someone proposed that the ceiling be set at 5% of the first $100 million. Jatras also proposed that anything due IBM on its counterclaim judgment be deducted before calculating the 5% fee. Lasky rejected this, but suggested as a compromise that the amount of the counterclaim judgment be deducted if Telex received $40 million or less in judgment or settlement.

Lasky added that if there was to be a ceiling on the contingent fee, there ought to be a minimum fee as well, and suggested that the minimum fee be $1 million. In his deposition, Jatras acknowledged that Lasky proposed a minimum fee, but disputed the other participant's account of the remainder of the discussion. According to Jatras, he told Lasky that Telex would not pay a minimum fee "unless we got something to pay it from." Lasky denied hearing such a proposal. The parties reached no final agreement at the San Francisco meeting. Jatras and Walker returned to Tulsa to discuss the meeting with the Telex management, while Lasky conferred with his partners.

The next day Walker drafted a memorandum to Jatras recounting the San Francisco meeting and including a proposed fee agreement. Jatras and Walker made some changes on the Walker draft agreement, and as modified, sent the proposed fee agreement to Lasky with a cover letter. The pertinent portion of this proposal, paragraph three, is set forth below:

> Once a Petition for Writ of Certiorari has been filed with the Clerk of the United States Supreme Court then Brobeck will be entitled to the payment of an additional fee in the event of a recovery by Telex from IBM by way of settlement or judgment in excess of the counterclaim judgment; and, such additional fee will be 5% of the first $100,000,000.00 of such recovery, the maximum contingent fee to be paid is $5,000,000.00 and the minimum is $1,000,000.00.

On the day he received the letter and proposed fee agreement, Lasky telephoned Jatras to tell him the proposal was not acceptable and that he would draft changes. Later that same day, Lasky sent to Jatras a letter in which he agreed to represent Telex and enclosed a memorandum agreement. This agreement, which Lasky had already signed, is set forth in full:

MEMORANDUM

1. Retainer of $25,000.00 to be paid. If Writ of Certiorari is denied and no settlement has been effected in excess of the Counterclaim, then the $25,000.00 retainer shall be the total fee paid; provided, however, that

2. If the case should be settled before a Petition for Writ of Certiorari is actually filed with the Clerk of the Supreme Court, then the Brobeck firm would bill for its services to the date of settlement at an hourly rate of $125.00 per hour for the lawyers who

have worked on the case; the total amount of such billing will be limited to not more than $100,000.00, against which the $25,000.00 retainer will be applied, but no portion of the retainer will be returned in any event.

3. Once a Petition for Writ of Certiorari has been filed with the Clerk of the United States Supreme Court then Brobeck will be entitled to the payment of an additional fee in the event of a recovery by Telex from IBM by way of settlement or judgment of its claims against IBM; and, such additional fee will be five percent (5%) of the first $100,000,000.00 gross of such recovery, undiminished by any recovery by IBM on its counterclaims or crossclaims. The maximum contingent fee to be paid is $5,000,000.00, provided that if recovery by Telex from IBM is less than $40,000,000.00 gross, the five percent (5%) shall be based on the net recovery, i.e., the recovery after deducting the credit to IBM by virtue of IBM's recovery on counterclaims or cross-claims, but the contingent fee shall not then be less than $1,000,000.00.

4. Once a Writ of Certiorari has been granted, then Brobeck will receive an additional $15,000.00 retainer to cover briefing and arguing in the Supreme Court.

5. Telex will pay, in addition to the fees stated, all of the costs incurred with respect to the prosecution of the case in the United States Supreme Court.

Jatras signed Lasky's proposed agreement, and on February 28 returned it to Lasky with a letter and a check for $25,000 as the agreed retainer. To "clarify" his thinking on the operation of the fee agreement, Jatras attached a set of hypothetical examples to the letter. This "attachment" stated the amount of the fee that would be paid to Brobeck assuming judgment or settlements in eight different amounts. In the first hypothetical, which assumed

a settlement of $18.5 million and a counterclaim judgment of $18.5 million, Jatras listed a "net recovery by Telex of "$0" and a Brobeck contingency fee of "$0."[1]

Lasky received the letter and attachment on March 3. Later that same day he replied.

> Your attachment of examples of our compensation in various contingencies is correct, it being understood that the first example is applicable only to a situation where the petition for certiorari has been denied, as stated in paragraph 1 of the memorandum.

No Telex official responded to Lasky's letter.

Lasky, as agreed, prepared the petition for certiorari and filed it in July 1975. He also obtained a stay of mandate from the Tenth Circuit pending final disposition of the action by the Supreme Court. In the meantime Telex began to consider seriously the possibility of settlement with IBM by having Telex withdraw its petition in exchange for a discharge of the counterclaim judgment. Telex officials planned a meeting to discuss whether to settle on this basis, and Walker asked Lasky to attend in order to secure Lasky's advice on the chances that the petition for certiorari would be granted.

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[1] The attachment in full provided:

Assumed Gross Judgment or Settlement on Antitrust Case	Assumed Judgment or Settlement on Counterclaim	Net Recovery by Telex	Brobeck Contingent Fee	Comment
$18,500,000	$18,500,000	$ 0	$ 0	
20,000,000	18,500,000	1,500,000	1,000,000	Minimum Fee
30,000,000	18,500,000	11,500,000	1,000,000	Minimum Fee
39,000,000	18,500,000	20,500,000	1,025,000	5% of Net
40,000,000	18,500,000	21,500,000	2,000,000	5% of Gross
60,000,000	18,500,000	41,500,000	3,000,000	5% of Gross
100,000,000	18,500,000	81,500,000	5,000,000	Maximum Fee
150,000,000	18,500,000	131,500,000	5,000,000	Maximum Fee

2/27/75

The meeting was held on September 5. Lasky told the assembled Telex's officials that the chances that the petition for certiorari would be granted were very good. Wheeler, however, was concerned that if the petition for certiorari was denied, the outstanding counterclaim judgment would threaten Telex with bankruptcy. Wheeler informed Lasky that Telex was seriously considering the possibility of a "wash settlement" in which neither side would recover anything and each would release their claims against the other. Lasky responded that in the event of such a settlement he would be entitled to a fee of $1,000,000. Wheeler, upon hearing this, became emotional and demanded to know from the others present whether this was what the agreement provided. Walker agreed that it had. Jatras said he didn't know and would have to read the correspondence.

Two days later Jatras wrote a memorandum for the Telex Board of Directors in which he stated:

> "Lasky claims that his deal guarantees him $1 million fee in the event that Telex settles after the Petition for Writ is filed if the settlement is at least a 'wash' with the counterclaim judgment."
>
> Wheeler doesn't agree that the Lasky interpretation is correct and has asked Jatras to review his notes and recollections of this matter. Jatras has done so and has no independent knowledge beyond the documents.

Having returned to San Francisco, Lasky, at Telex's request, prepared a reply brief to IBM's opposition to the petition for certiorari, and sent it to the Supreme Court on September 17th for filing. In the meantime, Wheeler opened settlement discussions with IBM. He telephoned Lasky periodically for advice.

On October 2 IBM officials became aware that the Supreme Court's decision on the petition was imminent.

They contacted Telex and the parties agreed that IBM would release its counterclaim judgment against Telex in exchange for Telex's dismissal of its petition for certiorari. On October 3, at the request of Wheeler and Jatras, Lasky had the petition for certiorari withdrawn. Thereafter, he sent a bill to Telex for $1,000,000. When Telex refused to pay, Brobeck filed its complaint. On the basis of depositions and exhibits, the district court granted Brobeck's motion for summary judgment.

In a somewhat contradictory fashion, Telex contends on appeal that a number of genuine issues of fact exist with respect to Brobeck's motion for summary judgment but that none exists concerning its own motion. Telex argues that it, not Brobeck, is entitled to summary judgment, or alternatively, to go to trial to determine the meaning of the contract. Telex raises three contentions:

1) Brobeck was discharged by Telex, and therefore, Brobeck was limited to recovering the reasonable value of its services;

2) the correct interpretation of the contract requires resolution of disputed factual issues;

3) the fee awarded under the contract was so excessive as to render it unconscionable. We discuss each of these contentions in turn.

I

Discharge

Telex contends that, under California law,[2] if a client who has retained an attorney on a contingent fee basis discharges the attorney before the contingency has occurred, the attorney is limited to recovering the reasonable value of the services rendered. *See Fracasse v. Brent,* 6

[2] The parties have assumed throughout that California law should be applied. We make the same assumption here.

Cal. 3d 784, 494 P.2d 9, 100 Cal. Rptr. 385 (1972). Telex contends there is a factual dispute as to whether Brobeck was discharged, and summary judgment was therefore inappropriate.

This contention borders on frivolousness. As Telex concedes, it never formally discharged Brobeck. Nor did it say or do anything from which an intent to terminate Brobeck prematurely could be inferred. Lasky, as agreed, prepared and filed the petition for a writ of certiorari. Even after the September 5, 1975 meeting with Telex, Lasky continued to render services to Telex. He prepared and filed a reply to IBM's response to the petition for certiorari, and during the settlement discussions with IBM, he advised Telex on the appropriateness of settlement when consulted by Telex officials.

Telex does not dispute these facts. It argues instead that "by relieving Brobeck of the task of pursuing the appeal (by its settlement with IBM), Telex discharged Brobeck as plainly as if the word 'discharge' was used." This analysis begs the question. Only if we assume that the wash settlement did not make the contingent fee clause operative is this line of reasoning persuasive. To make this assumption, however, we would have to adopt Telex's interpretation of the contract. This we cannot do. It is the very interpretation of the contract that is the central issue on this appeal, a matter to which we now turn.

II

Interpretation

Paragraph three of the memorandum agreement provided that Brobeck was entitled to an additional fee "in the event of a recovery by Telex from IBM by way of settlement or judgment of its claims against IBM." Telex contends that the wash settlement reached by IBM and Telex was not such a recovery because the contract con-

templated that Brobeck would be entitled to its contingent fee only if Telex actually received money in settlement of its suit with IBM. Telex contends that as a result of this "ambiguity," what the parties actually intended the contract to mean, as evidenced by their words and conduct, is a factual matter that cannot be resolved on a motion for summary judgment.

Under California law, the determination of whether a written contract is ambiguous is a question of law that must be decided by the court. *Airborne Freight Corp. v. McPherson,* 427 F.2d 1283, 1285 (9th Cir. 1970) (interpreting California law); *Brant v. California Dairies, Inc.,* 4 Cal. 2d 128, 133, 48 P.2d 13 (1935). Even if the written agreement is clear and unambiguous on its face, the trial judge must receive relevant extrinsic evidence that can prove a meaning to which the language of the contract is "reasonably susceptible." *Pacific Gas and Electric Co. v. G.W. Thomas Drayage Co.,* 69 Cal. 2d 33, 37, 442 P.2d 641, 69 Cal. Rptr. 561 (1968). If the court finds after considering this preliminary evidence that the language of the contract is not reasonably susceptible of interpretation and is unambiguous, extrinsic evidence cannot be received for the purpose of varying the terms of the contract. *Airborne Freight Corp.,* 427 F.2d at 1286; *Pacific Gas & Electric Co.,* 69 Cal. 2d at 39, 442 P.2d at 645, 69 Cal. Rptr. at 565. The case may then be disposed of by summary judgment, *Airborne Freight Corp.,* 427 F.2d at 1286; *see Parish v. Howard,* 459 F.2d 616, 619 (8th Cir. 1972), because interpretation of the unambiguous contract is solely a question of law. *Gardiner v. Gaither,* 162 Cal. App. 2d 607, 614, 329 P.2d 22 (1958).

In performing our judicial function of interpretation, we note that "it is beyond question that every provision of a contract should be examined to determine the meaning and intention of the parties . . . . the meaning of words contained in a contract is to be determined not from a

consideration of the words alone but from a reading of the entire contract." *Sunset Securities Co. v. Coward McCann, Inc.,* 47 Cal. 2d 907, 911, 306 P.2d 777 (1957). We seek to interpret the contract in a manner that makes the contract internally consistent.

Paragraph one of the agreement provided that:

> 1. Retainer of $25,000.00 to be paid. If Writ of Certiorari is denied and no settlement has been effected in excess of the Counterclaim, then the $25,000.00 retainer shall be the total fee paid; provided, however, that

Thus, paragraph one narrowly limits Brobeck's fee to its $25,000 retainer to one situation: where there has been no settlement in excess of the counterclaim *and* where the writ of certiorari has been denied. Telex would have us construe the agreement as if the conditions stated in this paragraph were fulfilled, which they were not. Rather, the language in paragraph one ("provided, however") clearly contemplated a different computation of the fee where the conditions in either of the succeeding two paragraphs were fulfilled.

Paragraph three began with the language "[o]nce a Petition for Writ of Certiorari has been filed with the Clerk of the United States Supreme Court . . . ." Thus, the filing of the petition for certiorari triggered the operation of paragraph three. The paragraph proceeds to outline the manner in which Brobeck's fee would be computed in the event of settlement. The fee was to be contingent on two ranges of settlement. For settlements of less than $100 million but greater than or equal to $40 million, Brobeck's fee would be 5% of the "gross" recovery, i.e., the amount "undiminished by any recovery by IBM on its counterclaims or cross-claims." For any settlement of less than $40 million gross, the 5% would be computed on the "net" recovery—i.e., the recovery after

deducting the credit to IBM by virtue of IBM's recovery against Telex—"but the contingent fee shall not then be less than $1,000,000." Because the settlement reached with IBM was for less than $40 million gross, Brobeck was entitled to the $1 million contingent fee.

Telex argues that, because it received no money by virtue of the wash settlement with IBM, there was "no recovery by Telex from IBM by way of settlement or judgment of its claims against IBM," and therefore, the condition on which Brobeck would be paid was never fulfilled.[3] Such a construction would create anomalies in the agreement that we cannot reasonably believe that the parties could have intended. First, Telex's requirement that it receive some cash by way of settlement of its claims against IBM could be satisfied by receipt of $1.00 from IBM. We agree with Brobeck that a construction of the contract that would condition the $1 million fee upon Telex's receipt of any amount of cash, no matter how slight, is untenable. Second, had Telex received $18.5 million from IBM in settlement of its antitrust claim, instead of receiving a discharge from its counterclaim judgment, it would have been in the same position as the wash settlement left it. Yet, Telex does not appear to dispute that in such a situation that Brobeck would be entitled to its $1 million fee. Telex's version of the agreement clearly exalts form over substance. Finally, Telex's construction of paragraph three is incompatible with paragraph two. Paragraph two provides that if the case is settled before the petition for a

[3] Telex discusses at considerable length the meaning of the word "recovery." We do not think that references to other cases for the definition of recovery is particularly useful. The meaning of recovery should be discerned from the context in which the parties themselves used the word. Here, the parties used the word to encompass either a "gross" recovery or a "net" recovery. Because the net recovery language was operative as the result of the settlement for less than $40 million, there was a "recovery" within the meaning of the word as the parties used it.

writ of certiorari is actually filed, then Brobeck could bill its services on an hourly basis not to exceed $100,000. It makes no sense to interpret paragraph three such that Telex pays less in attorney's fees where the petition is filed than when it is not. Not only would Brobeck have expended more time and effort where it actually completes and files the petition, but it also would have conferred on Telex the ability to use the completed petition as bargaining leverage in its negotiations with IBM. The substantial leverage that Telex gained by having filed a petition for certiorari is an explanation why Telex was willing to pay substantially more for a filed petition,[4] and in fact, Telex appears to have benefited significantly by having filed the petition.[5]

We conclude, therefore, that the contract was unambiguous on its face. As noted, however, California law allows a party to challenge a contract that is unambiguous on its face, *Pacific Gas & Electric Co.*, 69 Cal. 2d at 39-40, 442 P.2d at 645, 69 Cal. Rptr. at 565, and accordingly, Telex presented extrinsic evidence to the district court to show that the contract was susceptible of its interpretation. The district court apparently concluded that this evidence was insufficient reasonably to support Telex's interpretation of the contract. Having carefully reviewed this evidence, taking the facts presented by Telex as true and resolving all doubts in its favor, *see Handi Investment Corp. v. Mobil Oil Corp.*, 550 F.2d 543, 546 (9th Cir. 1977), we agree with the district court. We find that this evidence, if anything, compels our interpretation of the contract.

[4] In his deposition, Jatras stated that, but for the filed petition, "IBM would have no reasons to talk to us about anything."

[5] According to Walker's deposition the consensus at the February 20 meeting was that a minimum fee was warranted if a petition was filed, because a settlement negotiated after filing would be the result of having filed the petition.

Three persons were involved in the formation of the Telex-Brobeck agreement: Lasky, Jatras, Telex's president, and Walker, Telex's counsel. In their depositions, Lasky and Walker consistently agreed that the contract should be interpreted in the manner advanced by Brobeck: once the petition for certiorari was filed, Brobeck was entitled to collect at least $1 million unless Telex lost.[6]

The extrinsic evidence advanced by Telex to support its interpretation of the contract consists almost exclusively of Jatras' belief that an additional fee would be paid only if there was a net recovery (i.e., a settlement in excess of the counterclaim judgment). Jatras claims that he expressed his belief to Lasky on several occasions.

To the extent that Telex is relying on Jatras' subjective belief to establish the meaning of the contract, we must disagree. Under the modern theory of contracts we look to objective, not subjective, criteria in ascertaining the intent of the parties. *See Meyer v. Benko,* 55 Cal. App. 3d 937, 127 Cal. Rptr. 846 (1976). Even when we view Jatras's protestations as part of the objective circumstances surrounding the formation of the contract, we find that they do not make the contract reasonably susceptible to Telex's interpretation, because Jatras's words are contradicted by his later actions.

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[6] For instance, Walker wrote to Wheeler after the September 5th meeting:

> "In view of your statement that Telex may decide to 'throw in the sponge' I feel I should call to your attention the obligations for attorney fees which Telex will have in the event it pursues that course and a settlement is made by which the antitrust issues are given up in return for cancellation of the Counterclaim judgment.
>
> "My understanding of the arrangement between Telex and the Brobeck firm is that they are to receive a minimum fee of $1 million if settlement is entered into subsequent to the filing of the Petition for Writ."

In reviewing the objective criteria, we rely heavily on the documents reflecting the negotiations between Telex and Brobeck. These documents more accurately reflect the parties' intent than the hindsight recollections of the parties. This is true particularly in this case because Jatras had no independent recollection of the negotiations. Two days after the stormy September 5 meeting, Jatras wrote the previously quoted memorandum for the Telex Board of Directors in which Jatras stated:

> Wheeler doesn't agree that the Lasky interpretation is correct and has asked Jatras to review his notes and recollections of this matter. Jatras has done so and has no independent knowledge beyond the documents.

At his deposition, Jatras further stated that when Wheeler asked him at the September 5 meeting what the contract said, he told Wheeler that he did not know, and would have to review all the letters.

In particular, we address the significant differences between the paragraph three that was proposed by Jatras and rejected by Lasky,[7] and the version of paragraph three that was proposed by Lasky and agreed to by Jatras. To highlight the distinctions we set them forth as follows: underlining the pertinent sections:

PARAGRAPH 3 REJECTED

> "Once a Petition for Writ of Certiorari has been filed with the Clerk of the United States Supreme Court then Brobeck will be entitled to the payment of an additional fee in the event of a recovery by Telex from IBM by way of settlement or judgment *in ex-*

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[7] The parties dispute whether it was Jatras or Walker who added the final changes in the draft that was finally sent to Lasky. We attach no significance to whether Jatras or Walker made these changes, and therefore, this factual dispute is not "material."

cess of the counterclaim judgment; and, such additional fee will be 5% of the first $100,000,000.00 of such recovery, the maximum contingent fee to be paid is $5,000,000.00 and the minimum is $1,000,000.00."

PARAGRAPH 3 OF THE EXECUTED CONTRACT

"Once a Petition for Writ of Certiorari has been filed with the Clerk of the United States Supreme Court then Brobeck will be entitled to the payment of an additional fee in the event of a recovery by Telex from IBM by way of settlement or judgment *of its claims against IBM;* and, such additional fee will be five percent (5%) of the first $100,000,000.00 gross of such recovery, undiminished by any recovery by IBM on its counterclaims or cross-claims. The maximum contingent fee to be paid is $5,000,000.00, provided that if recovery by Telex from IBM is less than $40,000,000.00, the five percent (5%) shall be based on the net recovery, i.e., the recovery after deducting the credit to IBM by virtue of IBM's recovery on counterclaims or cross-claims, *but the contingent fee shall not then be less than $1,000,000.00.*"

From the above, it appears that the construction of the contract that Telex is presently advancing on appeal is the one contained in the version that was rejected by Brobeck. Telex explicitly proposed that Brobeck would be entitled to an additional fee in the event of a recovery in "excess of the counterclaim judgment." In other words, Telex proposed a contract whereby it would pay Brobeck only if Telex recovered an amount in excess of the amount owed on the counterclaim judgment. Brobeck, however, by excluding this limitation in its version sent Telex and to which the parties finally agreed, specifically rejected such a contract. We think that the only correct inference to be drawn from the omission of Telex's proposal in the final contract is that the parties agreed that Brobeck would

be entitled to its additional fee in the event of a settlement between IBM and Telex, without regard to whether the amount of settlement was greater than the counterclaim judgment.

The events surrounding the cryptic "attachment" that Jatras sent to Brobeck after the contract was signed also belie Telex's interpretation of the contract. The first example in the series of eight hypotheticals supports Jatras's interpretation that the contingent fee would be paid only if there was a net recovery to Telex.[8] Lasky, by a return letter, promptly disagreed with this interpretation, stating that it applied only in the situation when the petition for certiorari was denied. As Telex admitted in a request for admission:

> neither Mr. Jatras nor anyone else connected with defendants at any time wrote or spoke to Mr. Lasky concerning any statement in the letter of March 3, 1975, and particularly concerning the last paragraph. . . .

We regard Telex's inaction as acquiescing to Brobeck's interpretation of the contract.

Thus, we find that the extrinsic evidence offered by Telex did not make the contract reasonably susceptible to

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[8] It appears from Walker's deposition that Jatras knew when he sent the attachment that it was not in accord with the agreement. Walker:

> the purpose of the attached examples were to attempt to get Mr. Lasky to agree that if there was no net recovery by Telex, there would be no Brobeck contingency fee, and it was to get him to commit himself to agree to that, and that was my recollection of the purpose of the letter being written.
>
> Q. Did Mr. Jatras say to you why he wanted Mr. Lasky to commit himself to agree to that?
>
> A. Yes, because he felt that the memorandum as signed might not provide that . . ."

its interpretation. The contract remained unambiguous and disposition of the case by summary judgment was appropriate. *See Airborne Freight Corporation,* 427 F.2d at 1286.

III

Finally, Telex contends that the $1 million fee was so excessive as to render the contract unenforceable. Alternatively it argues that unconscionability depends on the contract's reasonableness, a question of fact that should be submitted to the jury.

Preliminarily, we note that whether a contract is fair or works an unconscionable hardship is determined with reference to the time when the contract was made and cannot be resolved by hindsight. *Yen Sue Chow v. Levi Strauss & Co.*, 49 Cal. App. 3d 315, 325, 122 Cal. Rptr 816 (1975).

There is no dispute about the facts leading to Telex's engagement of the Brobeck firm. Telex was an enterprise threatened with bankruptcy. It had won one of the largest money judgments in history, but that judgment had been reversed in its entirety by the Tenth Circuit. In order to maximize its chances of gaining review by the United States Supreme Court, it sought to hire the most experienced and capable lawyer it could possibly find. After compiling a list of highly qualified lawyers, it settled on Lasky as the most able. Lasky was interested but wanted to bill Telex on hourly basis. After Telex insisted on a contingent fee arrangement, Lasky made it clear that he would consent to such an arrangement only if he would receive a sizable contingent fee in the event of success.

In these circumstances, the contract between Telex and Brobeck was not so unconscionable that "no man in his senses and not under a delusion would make on the one hand, and as no honest and fair man would accept on the other." *Swanson v. Hempstead,* 64 Cal. App. 2d 681, 688,

149 P.2d 404 (1944). This is not a case where one party took advantage of another's ignorance, exerted superior bargaining power, or disguised unfair terms in small print. Rather, Telex, a multi-million corporation, represented by able counsel, sought to secure the best attorney it could find to prepare its petition for certiorari, insisting on a contingent fee contract. Brobeck fulfilled its obligation to gain a stay of judgment and to prepare and file the petition for certiorari. Although the minimum fee was clearly high, Telex received substantial value from Brobeck's services. For, as Telex acknowledged, Brobeck's petition provided Telex with the leverage to secure a discharge of its counterclaim judgment, thereby saving it from possible bankruptcy in the event the Supreme Court denied its petition for certiorari. We conclude that such a contract was not unconscionable.

The judgment of the district court is affirmed.

APPENDIX B

Order Denying Petition for Rehearing

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-1419

BROBECK, PHLEGER & HARRISON, a partnership,
Plaintiff-Appellee,

vs.

THE TELEX CORPORATION, a corporation, and
TELEX COMPUTER PRODUCTS, INC., a corporation
Defendants-Appellants

Before: MOORE,* SNEED and TANG, Circuit Judges

ORDER

Filed September 6, 1979

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Honorable Leonard P. Moore, Senior Circuit Judge for the Second Circuit, sitting by designation.

APPENDIX C

Lasky Letter of February 24, 1975

BROBECK, PHLEGER & HARRISON
ATTORNEYS AT LAW
ONE ELEVEN SUTTER STREET
SAN FRANCISCO, CALIFORNIA 94104
(415) 434-0900

Telecopier
(415) 434-0900
Cable Brobeck
Telex 34228

February 24, 1975

Mr. S. J. Jatras, President
The Telex Corporation
P. O. Box 1526
Tulsa, Oklahoma 74101

Dear Mr. Jatras:

This morning you and I discussed by telephone your letter to me of February 21 and the proposal enclosed with it for retention of the services of Brobeck, Phleger & Harrison in the case of *Telex v. IBM* recently decided by the United States Court of Appeals for the Tenth Circuit. In our telephone conversation you and I concurred on certain modifications and clarifications, and I have revised your memorandum accordingly.

The services of Brobeck, Phleger & Harrison are retained to represent Telex in seeking from the United States Supreme Court a writ of certiorari to the United States Court of Appeals for the Tenth Circuit for review of the latter's recent decision and, if the writ be granted, to brief and argue the case in the Supreme Court. We shall be in charge of the litigation in the Supreme Court and determine all questions of procedure and strategy. The terms

and conditions of our engagement are as set forth in this letter and the accompanying memorandum. In the event the Supreme Court should grant a writ and thereafter remand the case to the Court of Appeals for further proceedings, this firm will be under no obligation to perform services in the Court of Appeals after remand or to perform services in the trial court if the case should be returned to that court for further proceedings. That is to say, we shall have performed the services for which we were engaged and will have earned the compensation agreed to be paid by the enclosed memorandum when the Supreme Court has ruled. Should our services be subsequently sought in the Court of Appeals or in the trial court, that will be a matter for further discussion and agreement.

Our services relate to Telex's antitrust claims against IBM, and any necessary attention to IBM's counterclaim or cross-claims will continue to be the province of counsel who have heretofore attended to them, although we shall try to frame the proceedings on the petition for writ of certiorari so as to hold execution of IBM's judgment against Telex in abeyance pending decision of the Supreme Court on the antitrust questions. However, nothing is to be included in the petition for writ of certiorari in relation to the counterclaims if in our judgment it would imperil the chance of obtaining review of the antitrust questions.

Your letter of February 21 requested us to furnish you a monthly statement showing the hours expended by our firm on this case. As it is not our normal practice to give that kind of information, we would not do so unless paragraph 2 of the enclosed proposal comes into operation, and then we shall furnish the information, not monthly, but only in conjunction with any statement for services rendered under the provisions of that paragraph.

Enclosed are duplicates of the revised memorandum signed by me on behalf of the firm. If you find the terms

of this letter and the enclosed memorandum agreeable, will you please sign a copy of this letter and of the memorandum and return them to me, toegether with your check for the agreed retainer pursuant to paragraph 1 of the memorandum. We shall then be prepared to embark upon our services immediately.

The memorandum makes no provision for the situation if the Court of Appeals for the Tenth Circuit should grant Telex's pending petition for rehearing. In that event, we shall discontinue our work, and our services should be treated as if paragraph 2 of the memorandum applies. After granting a rehearing the Court of Appeals might render a new decision warranting a petition to the Supreme Court, but one cannot tell until the decision is rendered, and we should leave open what, if anything, we should be doing.

Very truly yours,
BROBECK, PHLEGER & HARRISON

By /s/ MOSES LASKY
Moses Lasky.

ML/d
Enclosures

AGREED TO, FEBRUARY 27, 1975:
THE TELEX CORPORATION

By S. J. JATRAS [signed]
S. J. Jatras, *President*

O.K.
JBB [initialed]

APPENDIX D

The Contingent Fee Agreement

MEMORANDUM

1. Retainer of $25,000.00 to be paid. If Writ of Certiorari is denied and no settlement has been effected in excess of the Counterclaim, then the $25,000.00 retainer shall be the total fee paid; provided, however, that

2. If the case should be settled before a Petition for Writ of Certiorari is actually filed with the Clerk of the Supreme Court, then the Brobeck firm would bill for its services to the date of settlement at an hourly rate of $125.00 per hour for the lawyers who have worked on the case; the total amount of such billing will be limited to not more than $100,000.00, against which the $25,000.00 retainer will be applied, but no portion of the retainer will be returned in any event.

3. Once a Petition for Writ of Certiorari has been filed with the Clerk of the United States Supreme Court then Brobeck will be entitled to the payment of an additional fee in the event of a recovery by Telex from IBM by way of settlement or judgment of its claims against IBM; and, such additional fee will be five percent (5%) of the first $100,000,000.00 gross of such recovery, undiminished by any recovery by IBM on its counterclaims or cross-claims. The maximum contingent fee to be paid is $5,000,000.00, provided that if recovery by Telex from IBM is less than $40,000,000.00 gross, the five percent (5%) shall be based on the net recovery, i.e., the recovery after deducting the credit to IBM by virtue of IBM's recovery on counterclaims or cross-claims, but the contingent fee shall not then be less than $1,000,000.00.

4. Once a Writ of Certiorari has been granted, then Brobeck will receive an additional $15,000.00 retainer to cover briefing and arguing in the Supreme Court.

5. Telex will pay, in addition to the fees stated, all of the costs incurred with respect to the prosecution of the case in the United States Supreme Court.

DATED: February 27, 1975.

APPROVED:	APPROVED:
THE TELEX CORPORATION	BROBECK, PHLEGER & HARRISON
By	
/s/ S. J. Jatras, President	/s/ Moses Lasky

APPENDIX E

Jatras Letter of February 28, 1975 (including the Attachment)

THE TELEX CORPORATION
P.O. Box 1526/Phone National 7-2333
Tulsa, Oklahoma 74101

Stephen J. Jatras
President

February 28, 1975

Moses Lasky, Esq.
Brobeck, Phleger & Harrison
One Eleven Sutter Street
San Francisco, California 94104

Dear Mr. Lasky:

Thank you for your letter of February 24, 1975 which you and I discussed after its receipt on February 26, 1975. In our telephone conversation I raised a question concerning the second paragraph (that part appearing at the top of page 2) of your letter which discusses the limitation on services to be performed by you. The language clearly indicates that the fee arrangement pertains to efforts by you to the point of any favorable Supreme Court ruling and is not intended to cover any subsequent proceedings in lower courts. I agreed that this is correct but pointed out that in such event both you and Telex would have a strong common motivation to pursue any such proceedings in an optimum manner. You indicated agreement with my comment but pointed out that you foresaw difficulty in attemping to provide for all eventualities and would therefore rather leave the particular point somewhat loose. I agreed with this conclusion in the telephone conversation and have subsequently discussed the matter with my associates. We feel that it is satisfactory to leave this point on the basis that you would at least lend support and consultation to any such proceedings and perhaps additional services depending upon the circumstances and will be reimbursed accordingly after further discussion and agreement.

Further discussion with my associates has raised some concern about the content of the first full paragraph which commences on page 2 and carries over to page 3. Our concern is that the petition for writ of certiorari might be framed in such manner that it would not stay the mandate on the Counterclaim judgment and this would, of course, cause us to be placed in an intolerable situation. We understand that you believe the Court of Appeals decision represents one judgment and that the petition should stay the Counterclaim judgment but the language commencing with the "However" on the last line on page 2 would seem to indicate that there could be circumstances where in your judgment you might want to completely omit the counterclaim issues and we might thus be placed in the situation that we fear the most. I believe therefore that such sentence should be modified by adding at the end following the word "questions" some words to the effect that "except as may be necessary to preclude a mandate being issued on the Counterclaim judgment." We would, of course, through our other counsel expect them to assume the burden of assisting in this part of the petition but I believe that we must have some flexibility in this regard, otherwise we may be forced into terminating further proceedings in the antitrust issue to protect ourselves from early extinction.

You raised a point of a possible ambiguity between paragraphs 1 and 3 of the Memorandum and I indicated that we would study this to ascertain if a change were appropriate. After discussion here I have concluded that there is no ambiguity and therefore no change is necessary. However, to clarify my thinking on this I worked out a number of examples which are set out in the attachment to this letter.

I think that the attachment is self explanatory and helpful in understanding the arrangement.

The balance of your letter is in line with our thinking and we have, therefore, executed the letter and the Memorandum and enclose a duly executed copy of each. Our check for $25,000 is enclosed. Please indicate your concurrence with this letter by your letter of confirmation.

We look forward to our association.

Yours very truly,

THE TELEX CORPORATION

By
/s/ S. J. Jatras

SJJ:ab
Attachment

ATTACHMENT

Assumed Gross Judgment or Settlement on Antitrust Case	Assumed Judgment or Settlement on Counterclaim	Net Recovery by Telex	Brobeck Contingent Fee	Comment
$ 18,500,000	$18,500,000	$ 0	$ 0	
20,000,000	18,500,000	1,500,000	1,000,000	Minimum Fee
30,000,000	18,500,000	11,500,000	1,000,000	Minimum Fee
39,000,000	18,500,000	20,500,000	1,025,000	5% of Net
40,000,000	18,500,000	21,500,000	2,000,000	5% of Gross
60,000,000	18,500,000	41,500,000	3,000,000	5% of Gross
100,000,000	18,500,000	81,500,000	5,000,000	Maximum Fee
150,000,000	18,500,000	131,500,000	5,000,000	Maximum Fee

2/27/75

APPENDIX F

Lasky Letter of March 3, 1975

Telecopier
(415) 434-0900
Cable Brobeck
Telex 34228

BROBECK, PHLEGER & HARRISON
ATTORNEYS AT LAW
ONE ELEVEN SUTTER STREET
SAN FRANCISCO, CALIFORNIA 94104
(415) 434-0900

March 3, 1975

Mr. Stephen J. Jatras,
President,
The Telex Corporation,
P. O. Box 1526,
Tulsa, Oklahoma 74101

Dear Mr. Jatras:

I acknowledge receipt of your letter of February 28, your retainer check to us for $25,000, and executed copies of our letter of February 24 and of the Memorandum which accompanied that letter and which you have dated February 27th. You and we appear to be in accord on the three matters to which your letter of February 28 refers.

The first has to do with the event of our obtaining a favorable Supreme Court ruling. We would then have no obligation to perform subsequent service in the Court of Appeals or in the trial court in order to have earned the agreed compensation, but, in order to realize our compensation, we would certainly have a strong interest in seeing that what occurred in the Court of Appeals or in the trial court culminated successfully. At that juncture we would desire to be consulted, and we should have no difficulty agreeing upon a basis of compensation for further services if services were required.

Your second concern has to do with possible omission from the petition for certiorari of the counterclaim issue. It will be to our own interest to prevent a mandate from being issued on the counterclaim judgment and coercing settlement from you at a very low figure. We are therefore agreeable to adding to the sentence of our letter of February 24 reading, "However, nothing is to be included in the petition for writ of certiorari in relation to the counterclaims if in our opinion it would imperil the chance of obtaining a review of the antitrust questions," the further clause, "except as may be necessary to preclude a mandate being issued on the Counterclaim judgment."

Your attachment of examples of our compensation in various contingencies is correct, it being understood that the first example is applicable only to a situation where the petition for certiorari has been denied, as stated in paragraph 1 of the "Memorandum."

We are proceeding immediately to work upon this case.

Sincerely,

BROBECK, PHLEGER & HARRISON

By /s/ MOSES LASKY
Moses Lasky.

ML:MD

In the Supreme Court of the United States

No. 79-590

THE TELEX CORPORATION, et al.,
Petitioners,

vs.

BROBECK, PHLEGER & HARRISON,
Respondent.

Brief In Opposition to Petition for Writ of Certiorari

MOSES LASKY
One Market Plaza
Steuart Street Tower
San Francisco, CA 94105
(415) 546-0200
Attorney for Respondent

Of counsel
LASKY, HAAS, COHLER & MUNTER

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

In the Supreme Court of the United States

No. 79-590

THE TELEX CORPORATION, et al.,
Petitioners,

vs.

BROBECK, PHLEGER & HARRISON,
Respondent.

Brief In Opposition to Petition for Writ of Certiorari

Neither question stated in the petition as presented is in the case, because the court below did not decide any question of fact.

The petition should be denied, for two separate reasons: (1) It was not filed in time. (2) It has no merit.

I. The Petition Is Untimely, Having Been Filed One Week Late

The petition correctly states that the judgment of the Court of Appeals was rendered on July 5, 1979, but erroneously states that a petition for rehearing was filed on July 19, 1979. The petition for rehearing was not filed until July 23, 1979, as is shown by a certified copy of the docket entries in the court below lodged with this brief.

The time for filing a petition for rehearing being 14 days (Rule 40(a), Fed. Rules of App. Proc.), that petition was 4 days late. A petition for rehearing does not operate to extend the time to petition for certiorari unless it is timely; otherwise there

is no presumption that the court acted on its merits. *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 147 (1942), *Safeway Stores, Inc. v. Coe*, 136 F.2d 771, 773, 774 (D.C. Cir. 1943); *Denholm & McKay Co. v. Commissioner of Internal Revenue*, 132 F.2d 243, 247-249 (1 Cir. 1942).

The petition for writ of certiorari was not filed until October 10, 1979, ninety-seven days after the judgment and therefore one week too late. The defect is jurisdictional.

II. The Petition Lacks Merit

This Court has often noted that its certiorari jurisdiction is used only to review and settle important questions of federal law, not to give a second appellate review to cases of concern only to litigants.[1]

This case is of concern only to the litigants. Here jurisdiction of a federal court rested solely on diversity of citizenship. The subject matter is a written contract, unique in substance and language to the parties and of no general interest. The issue was one of interpretation of that particular contract. The contract being a California contract, its interpretation is a matter of California law.[2]

In an effort to construct a federal question to engage the Court's attention, petitioners advance two arguments, one of constitutional law and one of power of a court under F.R.Civ.P. Rule 56, the summary judgment rule. But no constitutional question was raised, presented, or decided at any stage in either court below. As this Court has often observed, it does not ordinarily consider issues neither raised nor considered by the Court of Appeals. *Adickes v. Kress & Co.*, 398 U.S. 144, 147, n.2; *Tennessee v. Dunlap*, 426 U.S. 312, 314, fn. 2 (1976); *National*

1. E.g., letter of all the justices of the Court to Senator De Concini, June 22, 1978, quoted in 68 American Bar Journal, 1328 (Sept. 1979)

2. As stated in the opinion below, all parties treated the case as governed by California law. (Pet.App. 8a, fn. 2)

Labor Relations Board et al. v. Sears, Roebuck & Co., 421 U.S. 132, 163, 164; *Duignan v. United States*, 274 U.S 195, 200 (1927).

Moreover, both the constitutional question and the supposed Rule 56 question are based on the same erroneous assumption that the court below decided a question of fact. It did not. It is an elementary rule, certainly of California law, that interpretation of a contract is always a question of law, never of fact. If the interpretation would vary with whether a fact is A or B, the fact-finder will determine the fact but the effect on interpretation is *always* a question of law. *O'Connor v. West Sacramento Co.*, 189 Cal. 7, 207 Pac. 527 (1922); *Parsons v. Bristol Development Co.*, 62 Cal.2d 861, 865; 44 Cal.Rptr. 767 (1965, by Traynor, C.J.); *Brawthen v. H & R Block, Inc.*, 28 Cal.App.3d 131, n.1, 104 Cal.Rptr. 486 (1972), where the court said:

> "The *interpretation* of a contract, written or oral, is always a question of law for the court. There may be circumstances, not existent here, where the interpretation of one or more contractual versions permitted by the evidence is at issue. The question as to which was the contract of the parties would be one of fact, while the interpretation (if necessary) of that contract would remain a question of law." [Italics in original]

The principle is universal. In *Atwood v. City of Boston*, 310 Mass. 70, 37 N.E. 2d 131, 134 (1941):

> "But from whatever source light may be thrown on the contract * * * its meaning, what promises it makes, what duties or obligations it imposes, is a question of law for the court."

And, of course, whether an asserted fact is material, that is, whether it has any bearing at all on interpretation, is a question of law.

The petitioners' Oklahoma counsel refer to what they call an "unusual California parole evidence rule" but appear not to understand it. In some states, perhaps many, the rule is that, if a written contract is unambiguous on its face, extrinsic evidence will not be looked at by either judge or jury. The California rule postulates that what seems unambiguous on its face may turn out to be ambiguous in the light of extrinsic evidence and therefore allows preliminary examination of extrinsic evidence by the judge to determine admissibility. But the questions whether the contract is ambiguous and what effect, if any, the extrinsic evidence then has on interpretation are still questions of law. *Airborne Freight Corporation v. McPherson,* 427 F.2d 1283 (9 Cir. 1970).

Here the interpretation turned on no disputed fact. The contract was in writing, and there was no dispute as to what the writings were. Only one dispute of fact is claimed by petitioners. They claim that at a preliminary and exploratory meeting in San Francisco, petitioners' president, Mr. Jatras, said that Telex could pay a fee only if money was recovered out of which to pay. But, *for the purpose of the motion for summary judgment,* the fact was taken to be *exactly as petitioners claimed.* In respondent's brief in the Court of Appeals, we said (at p. 8):

> "Since we are here on a summary judgment case, we proceed as if the fact is as Jatras testified"

and that (p. 9):

> "it is irrelevant whether Jatras did or did not make the remarks attributed to him".

Similarly the Court of Appeals held that the fact was irrelevant to interpretation.

That court's opinion notes that Telex presented three contentions (Pet.App. p. 8a) and describes the pertinent one[3] as being a contention that "The correct interpretation of the contract re-

3. The other two contentions were that respondent had been discharged and that the fee was unconscionable. Neither question is presented in the petition.

quires resolution of disputed factual issues". The court's answer was that interpretation did *not* require resolution of any disputed factual issue. In the most explicit language (Pet.App., p. 13a), the court said,

> "[h]aving carefully reviewed this evidence, *taking the facts presented by Telex as true and resolving all doubts in its favor* [citation omitted] we agree with the district court. We find that this evidence, if anying, compels our interpretation of the contract." [Emphasis Added]

Thus accepting Jatras' testimony as true, the court's ultimate conclusion was (Pet.App., p. 17a):

> "Thus, we find that the extrinsic evidence offered by Telex did not make the contract reasonably susceptible to its interpretation. The contract remained unambiguous and disposition of the case by summary judgment was appropriate."

In short, the court did not perform a *fact finding function* or resolve any dispute of fact. Accepting the facts as claimed by petitioners, it performed the purely judicial function of interpretation. The correctness of that *judicial determination* is not a question which petitioners seek to have this Court review. Nor could it be, because the application of acknowledged principles of law to the particular facts of a case is no basis for certiorari. This Court should not be asked to review the particularities of a case for a third time in order to choose between litigants.

Nevertheless, as a matter of personal privilege, we may quickly show that the judgment below was inescapable. All the witnesses were in accord that no agreement was reached at the San Francisco meeting (Pet.App. 3a). The situation was that at that exploratory meeting, accepting Jatras' testimony, he had expressed a basis on which he wished to engage respondent, but respondent had stated the terms on which it would accept engagement, and those terms did not embrace limiting compensation to cash collected. Petitioners could either accept the terms suggested by

respondent or look elsewhere. Mr. Jatras returned home, prepared a written draft of the kind of agreement which he desired, and sent it to respondent. *If* his proposal had been accepted, it would have provided the very agreement for which petitioners now contend. But respondent, in writing, rejected Mr. Jatras' proposal and counterproposed a different agreement. Regardless of what Mr. Jatras had said in San Francisco, by agreeing to the counterproposal petitioners bound themselves to a different contract. As the court below observes (Pet.App. 16a), "the construction of the contract that Telex is presently advancing on appeal is the one contained in the version that was rejected by Brobeck . . . Brobeck, however, by excluding this limitation in its version sent Telex and to which the parties finally agreed, specifically rejected such a contract."

That is the simplicity of the case.

CONCLUSION

The petition is not only out of time; it seeks to present questions that do not exist. We respectfully submit that it should be denied.

Dated: San Francisco, California
November 6, 1979

MOSES LASKY
Attorney for Respondent

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-590

THE TELEX CORPORATION, a corporation, and
TELEX COMPUTER PRODUCTS, INC., a corporation,
Petitioners,

v.

BROBECK, PHLEGER & HARRISON, a partnership,
Respondent.

REPLY BRIEF OF PETITIONERS IN SUPPORT OF A WRIT OF CERTIORARI

FREDERIC DORWART
J. MICHAEL MEDINA
Suite 700, Holarud Building
10 East Third Street
Tulsa, Oklahoma 74103

Attorneys for Petitioners

Of Counsel:

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TABLE OF CONTENTS

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REPLY BRIEF OF PETITIONERS IN SUPPORT OF A WRIT OF CERTIORARI

This Reply Brief is being filed by the Petitioners in response to the Brief in Opposition to Petition for Writ of Certiorari. Respondent has raised only two defenses to Petitioners' request for certiorari. These two defenses can be summarily addressed.

I. THE PETITION IS TIMELY

Respondent contends that the Petition for a Writ of Certiorari was not timely filed because Petitioners had failed to timely file their Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit.

Respondent is in error. The Petition for Rehearing was timely filed and, therefore, the Petition for a Writ of Certiorari is timely.

The judgment of the United States Court of Appeals was rendered on July 5, 1979. Consequently, the last day for timely filing of the Petition for Rehearing was on July 19. (F.R.A.P., Rule 40(a)). Petitioners mailed their Petition for Rehearing to the Court of Appeals on July 19. (See Declaration of Jean Drennen, reprinted as Exhibit A in the Appendix at 1a).[1] Service on Respondent was also effected by mailing on July 19, 1979. (See Affidavit of H. Mathew Moore, with attached executed "Proof of Service by Mail," reprinted as Exhibit B in the Appendix at 2a). Under F.R.A.P., Rule 25(a), it is provided, in pertinent part, that

> "(a) Filing: . . . *briefs and appendices shall be deemed filed on the day of mailing* if the most expeditious form of delivery by mail, excepting special delivery, is utilized." (emphasis added).

The policy of the United States Court of Appeals for the Ninth Circuit is clear: *Petitions for rehearing are treated as briefs and are deemed filed as of the date of mailing:*

> "Please be advised that it is the Court's practice to consider a petition for rehearing filed on the day it is served. While the practice has been established by way of an internal directive, it is also supported by a combined reading of Federal Rules of Appellate Procedure 40, 31 and 25.

[1] The originals of the documents reprinted in the Appendix have been delivered to the Clerk of the United States Supreme Court under separate cover.

> "Rule 40 construes a petition as a brief by way of reference to Rule 31 covering briefs. Rule 25 states that '[b]riefs and appendicies [sic] shall be deemed filed on the day of mailing.'" (Letter of Franco Mancini, Senior Deputy Clerk, Office of the Clerk, United States Court of Appeals for the Ninth Circuit, to Peter C. Bronson, attached as Exhibit A to the Declaration of Peter C. Bronson, reprinted in the Appendix as Exhibit C at 6a).

The Petition for Rehearing, having been mailed to the Court of Appeals on July 19, was timely filed. It was merely a ministerial error that caused the Court of Appeals' docket sheet to read that the Petition for Rehearing was filed on July 23.[2] The Petition for Rehearing was filed as of the date of mailing.[3]

The erroneous nature of Respondent's contention is thus immediately recognizable. Treatment of Petitions for Rehearing as briefs under F.R.A.P. Rule 25(a) is left to the discretion of the Court of Appeals. The Court of Appeals has made the decision to treat Peti-

[2] As is evident from the filing stamps on the cover of the Petition for Rehearing, it was received by the Court of Appeals on July 23, 1979 (a Monday), and accidently marked as filed as of that date. (See Exhibit A to the Affidavit of H. Mathew Moore, Appendix at p. 4a).

[3] Treatment of a petition for rehearing as a brief is supported by F.R.A.P. Rule 40(b), which makes Rules 31(b) and 32(a) relating to briefs, applicable to petitions for rehearing. Furthermore, in similar contexts, courts have treated petitions for rehearing as briefs. See *Combs* v. *Haddock*, 209 Cal. App. 2d 627, 26 Cal. Rptr. 252 (1962); *Heimann* v. *Los Angeles*, 91 Cal. App. 2d 311, 104 P.2d 955 (1949); *Weck* v. *Los Angeles Flood Control Dist.*, 89 Cal. App. 2d 278, 200 P.2d 806 (1948). (Petitions for rehearing briefs for purposes of recovery of printing costs).

tions for Rehearing as briefs. The Petition for a Writ of Certiorari is timely.[4]

II. THE PETITION HAS SUBSTANTIAL MERIT

The Respondent suggests that the Petition for a Writ of Certiorari fails to present serious issues of merit. Respondent's suggestion is untenable. The Petition presents *substantial issues of public importance.* The two issues Petitioners urge are:

> 1. "Whether a federal court, sitting under its diversity jurisdiction, can constitutionally apply the forum state's parol evidence rule to deprive a party of its seventh amendment right to a jury trial on disputed fact issues?"
>
> 2. "Whether a federal court, upon a hearing on a motion for summary judgment under Federal Rule of Civil Procedure 56, can weigh conflicting evidence and resolve disputed issues of fact?"

The two issues present questions of substantial public interest.[5]

---

[4] Even if one were to assume—contrary to a proper reading of the Federal Rules and the actual practice of the Ninth Circuit—that the Petition for Rehearing had not initially been timely filed, the Court of Appeals' actions in having the Petition for Rehearing circulated to the panel, advising the full Court of the suggestion *en banc,* and denying the Petition for Rehearing on the merits conclusively show that the Court of Appeals exercised its power under F.R.A.P. Rule 26(b) to "permit an act to be done after the expiration of such time [the time prescribed by the pertinent rule]." See Order Denying Petition for Rehearing, in Petition for a Writ of Certiorari, at p. 20a.

[5] The Respondent has contended that these issues were not raised below and are therefore not appropriately before this Court. On the contrary, the main issue before the Court of Appeals was the district court's denial of the jury trial to Petitioners by its weighing of conflicting evidence in granting Respondent's motion for summary judgment.

The fact in dispute. The *fact* in dispute is whether Mr. Jatras expressed to Mr. Lasky Petitioners' insistance that Lasky would be entitled to an additional fee only if there were a net recovery. This *fact* is clearly relevant and material. The lower courts *interpreted* the contract "because" the lower courts refused to believe Mr. Jatras's sworn testimony. That *finding of fact* requires a jury under the seventh amendment and at least a non-jury trial under Rule 56. The issue is not *de minimis.* It was solely on the basis of this "finding of fact" that the lower court awarded an attorney a million-dollar fee on a disputed contract that the lawyer himself drafted.

First. The lower courts utilized the California parol evidence rule to deprive Petitioners of their right to a jury trial. In attempting to deflect the Court's attention from the constitutional issue presented in the Petition, Respondent engages in discussion of the niceties of California parol evidence law and the relative roles of judge and jury under the California procedure. That is not the issue. The issue is: *Can a federal court constitutionally apply a forum state's parol evidence rule to deprive a party of his constitutional right to a jury trial?* California's decision in allocating to the court a fact-weighing function is irrelevant. The seventh amendment sets the standards to be followed in the federal courts. One such standard is that it is the jury's function to weigh the evidence. The lower courts clearly weighed the evidence and violated Petitioners' right to a jury trial. In considering the value of Mr. Jatras's testimony, the Court of Appeals stated:

> "Even when we view Jatras's protestations as part of the objective circumstances surrounding the formation of the contract, we find that they do not

make the contract reasonably susceptible to Telex's interpretation, *because Jatras's words are contradicted by his later actions.*

"In reviewing the objective criteria, we rely heavily on the documents reflecting the negotiations between Telex and Brobeck. *These documents more accurately reflect the parties' intent than the hindsight recollections of the parties.* This is particularly true in this case because Jatras had no independent recollection of the negotiations." (Appendix to Petition for a Writ of Certiorari, pp. 14a-15a). (emphasis added).

The lower courts thus clearly engaged in:

1. weighing Mr. Jatras's sworn testimony by his alleged later actions;

2. assigning a greater evidentiary value of certain post-contract documents than to Mr. Jatras's sworn testimony; and

3. impeaching Mr. Jatras's testimony on grounds of no independent recollection of pre-contract "negotiations."

The lower courts violated Petitioners' seventh amendment rights. Petitioners were entitled to a jury trial.

Second. Even if the parol evidence issue were an issue for the court, it remained an issue of *fact* and under F.R.C.P., Rule 56, Petitioners have a right to a non-jury trial on the issue. The lower courts used the summary judgment procedure as a substitute for a non-jury trial. The lower courts used the California standard of "reasonably susceptible" in granting Respondent's motion for summary judgment. This was clear error. In determining whether a fact issue existed under Rule 56, the federal courts must use the standard of "no genuine issue of material fact," a much tougher

standard. Therefore, the fact that a judge decides both the summary judgment and a non-jury trial is not controlling. Important procedural rights occur in a non-jury trial, including the right of cross-examination and demeanor observation. A summary judgment hearing is simply not a substitute for a trial.

CONCLUSION

The Petition for a Writ of Certiorari is timely; it raises substantial questions of public importance; and it should be granted.

Respectfully submitted,

FREDERIC DORWART
J. MICHAEL MEDINA
Suite 700, Holarud Building
10 East Third Street
Tulsa, Oklahoma 74103

Attorneys for Petitioners

Of Counsel:

HOLLIMAN, LANGHOLZ, RUNNELS & DORWART
Suite 700, Holarud Building
10 East Third Street
Tulsa, Oklahoma 74103

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that in accordance with Rule 33(1) of the Revised Rules of the Supreme Court of the United States, three true and correct copies of the foregoing "Reply Brief of Petitioners in Support of a Writ of Certiorari" have been delivered to Brobeck, Phleger & Harrison, One Market Plaza, Spear Street Tower, San Francisco, California 94105, and Moses Lasky, Esq., One Market Plaza, Steuart Street Tower, San Francisco, California 94105, by placing the same in the United States mail with airmail postage prepaid, certified mail, return receipt requested, correctly addressed, on the 21st day of November, 1979.

EXHIBITS

EXHIBIT A

Declaration Re Filing By Mail

I, Jean Drennen, declare:

1. I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of 18 years and not a party to the action entitled *Brobeck, Phleger & Harrison vs. The Telex Coporation;* my business address is 6500 Flotilla Street, Los Angeles, California.

2. On July 19, 1979, I filed Defendants-Appellants' Petition for Rehearing and Suggestion of Appropriateness of a Rehearing In Banc in the above action, No. 77-1419 in the United States Court of Appeals for the Ninth Circuit, pursuant to Rule 25(a) of the Federal Rules of Appellate Procedure and Rule 13(d) of the Local Rules of the Ninth Circuit Court of Appeals, by placing the original and 24 copies of said document enclosed in a sealed envelope with postage fully prepaid, in the United States Post Office mailbox at Los Angeles, California, addressed to the Clerk of the United States Court of Appeals, 7th and Mission Streets, P.O. Box 547, San Francisco, California 94101.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 15, 1979, at Los Angeles, California.

/s/ JEAN DRENNEN
Jean Drennen

EXHIBIT B

Affidavit of H. Mathew Moore

STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO.

H. MATHEW MOORE, being first duly sworn, deposes and says as follows:

1. I am employed by the law firm of HOWARD, PRIM, RICE, NEMEROVSKI, CANADY & POLLAK, a Professional Corporation. If called upon to do so, I could competently testify of my own personal knowledge to the facts set forth herein.

2. On November 9, 1979, I inspected the contents of the file for the civil case entitled *Brobeck, Phleger & Harrison* v. *Telex Corp., et al.*, Case No. 77-1419, located at the Office of the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit in San Francisco, California.

3. I removed from the file a document entitled "Defendants-Appellants' Petition for Rehearing and Suggestion of Appropriateness of a Rehearing In Banc" (hereafter referred to as "Petition") and requested the Deputy Clerk of Court to certify that the pages attached to this affidavit were true copies of the front and back covers and "Proof of Service by Mail" contained in the Petition. I was informed by the Deputy Clerk that the Clerk's Office would not certify documents filed by parties to actions in the Ninth Circuit Court of Appeals.

4. Thereafter, I made photocopies of the front and back covers and "Proof of Service by Mail" contained in the Petition, which are attached hereto as Exhibit A.

5. The pages contained in Exhibit A are true copies of the above-described portions of the Petition as it appears

on file in the Office of the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit, located in San Francisco, California.

DATED: November 12, 1979.

/s/ H. MATHEW MOORE
H. Mathew Moore

Sworn to and subscribed before me this
12th day of November, 1979.

/s/ BEVERLY H. THOMPSON
Beverly H. Thompson
Notary Public

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 77-1419

BROBECK, PHLEGER & HARRISON, *a partnership,*
Plaintiff and Appellee,
vs.
THE TELEX CORPORATION, a corporation, and TELEX COMPUTER PRODUCTS, INC., a corporation,
Defendants and Appellants.

Appeal From the United States District Court,
Northern District of California.

Defendants-Appellants' Petition for Rehearing
and
Suggestion of Appropriateness of a Rehearing In Banc.

SEVERSON, WERSON, BERKE & MELCHIOR,
KURT W. MELCHIOR,
MICHAEL J. BERTINETTI,
One Embarcadero Center, 25th Floor,
San Francisco, Calif. 94111,
(415) 398-3344,

KAPLAN, LIVINGSTON, GOODWIN, BERKOWITZ & SELVIN,
HERMAN F. SELVIN,
PETER C. BRONSON,
450 North Roxbury Drive,
Beverly Hills, Calif. 90210,
(213) 274-8011,

Attorneys for Defendants-Appellants.

Received: Emil E. Melfi, Jr., Clerk, U.S. Court of Appeals, July 23, 1979.

Filed: 7-23-79 *by:* V.T.

Docketed: 7-25-79 *by:* V.T.

Proof Of Service By Mail

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 6500 Flotilla Street, Los Angeles, California.

On July 19, 1979, I served the within PETITION FOR REHEARING & SUGGESTION OF APPROPRIATENESS OF A REHEARING IN BANC in re: Brobeck, Phleger & Harrison vs. The Telex Corporation", in the United States Court of Appeals for the Ninth Circuit, No. 77-1419; on the attorneys in said action, by placing 3 copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

BROBECK, PHLEGER & HARRISON
111 Sutter Street
San Francisco, Calif. 94104
Attn: Moses Lasky

I certify (or declare), under penalty of perjury, that the foregoing is true and correct.

Executed on July 19, 1979, at Los Angeles, California.

/s/ JEAN DRENNEN
Jean Drennen

Back Cover of Petition for Rehearing

Service of the within and receipt of a copy thereof is hereby admitted this 19th day of July, A.D. 1979.

/s/ Proof of Service Enclosed

EXHIBIT C

Declaration Of Peter C. Bronson

I, Peter C. Bronson, declare:

1. I am an attorney at law duly admitted to practice before the United States Court of Appeals for the Ninth Circuit, and an associate in the law firm of Kaplan, Livingston, Goodwin, Berkowitz & Selvin, co-counsel for defendants and appellants in the matter of *Brobeck, Phleger & Harrison* v. *The Telex Corporation, et al.*, Case No. 77-1419 on the docket of said Court.

2. I have personal, first-hand knowledge of the truth of the matters set forth herein, and could and would so testify if called as a witness.

3. Attached hereto as Exhibit A is the original of the letter I received today from Mr. Franco Mancini, Senior Deputy Clerk of the Court of Appeals for the Ninth Circuit. Mr. Mancini's letter confirmed a telephone conversation between him and me on November 8, 1979, in which Mr. Mancini told me that it is the Court's practice to consider as timely filed a petition for rehearing mailed to the Court on the last day for filing. In that conversation, Mr. Mancini told me that the Ninth Circuit considers a petition for rehearing to be a brief for purposes of Rule 25(a) of the Federal Rules of Appellate Procedure.

I declare under penalty of perjury that the foregoing is true and correct.

Executed November 15, 1979, at Beverly Hills, California.

/s/ PETER C. BRONSON
Peter C. Bronson

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

U. S. Court of Appeals and Post Office Building
7th & Mission Streets, P.O. Box 547
San Francisco, California 94101

November 13, 1979

Peter Bronson, Esq.
450 North Roxbury
Suite 605
Beverly Hills, CA 90210

Dear Mr. Bronson:

Please be advised that it is the Court's practice to consider a petition for rehearing filed on the day it is served. While the practice has been established by way of an internal directive, it is also supported by a combined reading of Federal Rules of Appellate Procedure 40, 31 and 25.

Rule 40 construes a petition as a brief by way of reference to Rule 31 covering briefs. Rule 25 states that "[b]riefs and appendicies [sic] shall be deemed filed on the day of mailing . . ."

Cordially,

/s/ FRANCO MANCINI
Franco Mancini
Senior Deputy Clerk

FM/bas